IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 3RD OCTOBER 2007 / 11TH ASWINA 1929

AS.No. 367 of 2002()

OS.524/1993 of PRL.SUB COURT,TRIVANDRUM
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APPELLANT: DEFENDANT

M/S.HINDUSTAN LATEX LTD., LATEX BHAVAN,
MAHILAMANDIRAM ROAD, POOJAPPURA,
THIRUVANANTHAPURAM.

BY ADV. SRI.U.K.RAMAKRISHNAN
SRI.E.K.MADHAVAN
SRI.P.V.LOHITHAKSHAN
SRI.A.N.KUTTAN
SRI.DEVIDAS.U.K

RESPONDENTS: PLAINTIFF

RELCON FOUNDATIONS PVT.LTD.,
T.C.3/9, KESAVADASAPURAM,
THIRUVANANTHAPURAM - 4, REPRESENTED
BY ITS MANAGING DIRECTOR, MR.T.K.ALEXANDER VAIDYAN

BY ADV. SRI.K.L.NARASIMHAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ALONG
WITH A.S. NO.368/2002 ON 03/10/2007, THE COURT ON 03/10/2007
DELIVERED THE FOLLOWING:

P.R.RAMAN &
V.K.MOHANAN, JJ.

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A.S. Nos.367 and 368 of 2002

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Dated this the 3rd day of October, 2007.

JUDGMENT

Raman, J.

A.S. No.367/2002 arises out of the judgment and decree passed in O.S. No.524/1993 and A.S. No.368/2002 arises out of the judgment and decree passed in O.S. No.523/1993 on the file of the Subordinate Judge's Court, Thiruvananthapuram. Parties are same, subject matter of the contest is also same. The claim in O.S. No.523/1993 was for return of the security deposit with interest, whereas in O.S. No.524/1993 claim was for money for extra items of work done by the plaintiff. Both the Suits were tried together and disposed of by a common judgment. In O.S. No.523/1993 except to the extent of declining to grant a declaration that a particular clause contained in the agreement is void, the plaintiff had been granted a decree for the amount claimed in the Suit with 12% interest. As far as the claim in O.S. No.524/1993 is concerned, there were seven items of claim, out of which the court below partly allowed the claim. As regards the extra items, against the claim of Rs.1,62,932/-, decree was granted for an amount of Rs.1,32,568/-. Likewise for difference in payment due to wrong

measurement, claim for Rs.13,109/- was allowed. An amount of Rs.55,291/- was allowed towards refund of excess recovery of cement and steel. Both the above appeals since arising out of common judgment, we dispose of these appeals together.

2. We now proceed to take up for consideration A.S. No.367/2002 arising out of O.S. No.524/1993. Under item 1, the plaintiff has claimed an amount of Rs.1,62,932/- being the additional payment of extra items over an above included by the KITCO (Consultant) in the final bill. The court below discussed this claim in paragraph 19 of its judgment. This was a claim relating to foundation belt assembly as per detailed drawings and fixing it in correct lines and levels. The plaintiff calculated an amount of Rs.1169.04 per unit including cost of materials, charges for transportation, supervision, sales tax and profit of 15%. But the appellant-defendant paid only at the rate of Rs.441.49 per unit leaving a difference of Rs.727.55. This difference is claimed under this head. There is no dispute that the total number of foundation belt assembly comes to 32. The plaintiff has calculated the value of grouting of base plat at Rs.136.07 per unit and for the 32 units it was worked out at Rs.4354.24. For concrete work of columns the rate per unit is calculated at Rs.719.58 per m^3. The plaintiff measured the quantity of work on account of concrete work of columns as 41.79 m^3 and he calculated the value at Rs.30071.25, M.S. plates at the rate of 13.536 per kilogram for 1567.336 kg which works out to Rs.21215.45.

The court below allowed the claim with reduced rate of profit at 10% as against 15% and thus awarded an amount of Rs.1,32,568/-. In this connection the specific contention raised by the appellant in his written statement is that as per clause 10 of Ext.B1 agreement an extra item to which no rate is provided in the contract will be paid at the PWD rate and if any deviation is required to be made, the contractor has to submit a written claim one week ahead of the work. He referred to paragraph 38 of the written statement wherein he denies the averments made in the plaint in paragraph 20. It is stated that the extra items executed by the plaintiff are not included in the contract and for which no rate was fixed and so the plaintiff was paid on the basis of PWD rate and the prevailing market rate and for those items which are included in the contract and executed by the plaintiff with or without variation or alteration in specifications or designs, the plaintiff was paid at the rate in accordance with agreed rate provided under the general conditions of the contract. The rates provided for extra items were worked out based on the prevailing market rate with reasonable profit margin.

3. Clause 10 of the general conditions of the contract prescribes the procedure for dealing with extra items, as per which the contractor is required to inform within seven days of the date of an order to carry out an extra item of work which he proposes to charge for such work and in this case the plaintiff executed the work without intimating its rate for executing

it. The court below, however, while considering the claim for extra items of work, did not specifically advert to the contentions raised in the written statement and as to whether the plaintiff is entitled to be paid for such extra items deviating from the PWD rate. According to the learned counsel Sri.Narasimhan appearing on behalf of the respondent, separate rates are provided in the contract for separate items and this extra item is only a combination of various items for which separate rates are provided in the contract itself and therefore, the rates as provided for specific item is added and what he has claimed is strictly in accordance with the contract.

4. In order to appreciate the rival submissions made by the parties, probably we would have remitted the case to the court below, but considering the fact that the suit itself is of the year 1993, it will not be in the interest of either side to remand this case to consider this aspect of the matter as it will further delay in disposal of the claim made in the suit. With that in view, we suggested to the parties to arrive at a reasonable figure under item 1 so that this court could make appropriate modification in the decree now passed. Both sides fairly submitted that as against the award of Rs.1,32,568/-, the decree could be passed for an amount of rupees one lakh under this item. Accordingly, we fix that plaintiff is entitled for an amount of Rs.1 lakh under this head instead of Rs.1,32,568/-. To that extent we modify the decree passed by the court below.

5. The difference in the payment due to wrong measurement of the

cement and steel, we find that only if the materials are supplied by the awarder, the question of a further rebate on the cost of materials would arise. The plaintiff has taken a rebate even for those quantities of materials procured by the defendant. Therefore, the court below has rightly allowed the claim and granted a decree for an amount of Rs.55,291/- towards the refund of excess recovery of cement and steel and other materials. Regarding difference in payment due to wrong measurement, what has been granted is only a paltry sum of Rs.13,109/-. We do not think it is justified to interfere with the same. Accordingly, the same is confirmed. The court below has awarded interest at 6%. In the circumstances, we confirm the decree and judgment passed by the court below in all respects except the claim for extra items which we have already modified at Rs.1 lakh instead of Rs.1,32,568/-. The judgment and decree passed by the court stand modified accordingly.

A.S. No.368/2002

At the time of entering into contract, the defendant as per the tender condition has to make a security deposit and this case an amount of Rs.2,37,085/- was deposited. As per the contract, this security deposit will be retained by the awarder until the expiry of the defect liability period. In this case, the defect liability period expired on 31.10.1990. Normally this amount ought to have been refunded to the contractor if there was no claim by the awarder against him. But placing reliance on clause 5.8.2 of Ext.B1

agreement, the amounts were retained by the awarder. The contention was that since the contractor has raised a claim for extra items, damages etc., until he gives a no claim certificate, no refund of the security deposit could be made. As a matter of fact, the plaintiff had filed a Company Petition before this court as C.P. No.8/1991 for winding up of the company stating that admitted amounts by way of security deposit is due from the company and the company is unable to pay the said debt and therefore, the company is liable to be wound up. This court by Ext.A9 judgment dismissed the said petition. This court found that the conditions contained in Ext.B1 agreement pertaining to retention of security deposit vide clause 5.8.2 was not challenged and this court also observed that in terms of the said clause, when there is a claim raised by the contractor, it cannot be said that the retention amount is at that point liable to be refunded. Though argument was raised that this finding by the Company Court vide Ext.P9 judgment will operate as res judicata, the court below rightly found that the said judgment in no way operates as a res judicata as regards the contention raised in the suit. There was a specif prayer in the suit for declaration of clause 5.8.2 of Ext.B1 agreement as illegal and opposed to public policy. The court below thought that in the nature of contentions raised by the parties and in view of the other suit which has been tried along with the present suit, it will be sufficient if monitory relief claimed in the suit is considered and relief granted instead of setting aside the clause itself as

illegal. When the other suit is partly allowed, it admits of no doubt that even on the date of completion of the work, the plaintiff was entitled for more amounts than what has been paid by way of final bill. We have with slight modification of that judgment confirmed the same in the foregoing paragraph. If so, plaintiff cannot be faulted for raising a claim against the defendant and that cannot be a ground for rejecting the claim for refund of the security deposit. In that view of the matter, the court below was perfectly justified in granting a decree for refund of the security deposit. However, in this case, interest has been awarded at 12% from the date of expiry of the defect liability period till realisation. As per Section 34 of the Code of Civil Procedure, the rate of interest after the decree is a matter of discretion to be exercised after taking into account all aspects of the matter. Admittedly when the amount is due and payable to the plaintiff on the completion of the work and when he has not paid the said sum, he is entitled for a reasonable rate of interest from the date on which the amount has become due and payable till the decree is passed as has been awarded in this case. But we think in the factual situation the rate of interest at 12% thereafter would not be justified. Hence we reduce the rate of interest to 6% from the date of decree till realisation. To that extent alone we modify the judgment and decree passed by the court below and confirm the same in all other respects. In other words the suit is decreed with interest at 12% from the date of the suit till the date of decree and thereafter at 6% till

realisation.

Both the appeals are disposed of as above and parties shall bear their respective costs.

P.R.RAMAN
Judge

V.K.MOHANAN
Judge

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